Supreme Court, U.S.
FILED
JAN 11 2006
OFFICE OF THE CLERK

(3)

No. 05-497

In the Supreme Court of the United States

JAMES R. LUKOWSKI AND
LESTER J. BLAUVELT,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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The simple but critical question presented by this case is whether – as the Sixth Circuit concluded – the Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), drastically altered the traditional "physical impact" test so that the plaintiff in an F.E.L.A. case can only recover for emotional injury "caused by **fear of physical injury to himself**[.]" *Lukowski v. CSX*, 416 F.3d 478, 483-84, quoting *Gottshall*, 512 U.S. at 556 (emphasis added).

There is no dispute that Lukowski and Blauvelt sustained "physical impact" when their locomotive collided with a pickup truck. The Court of Appeals acknowledged that Lukowski and Blauvelt sustained physical impact as a result of the collision. As the Sixth Circuit recounted:

> "Plaintiffs were operating the train during the collision, and they were jostled around in their seats, which **caused minor physical injury**. Thus, Plaintiffs sustained a slight **physical impact**, and due to the nature of the accident, they were also placed in immediate risk of physical harm."

Lukowski, 416 F.3d at 482-83 (emphasis added).

There is also no legitimate dispute that Lukowski and Blauvelt presented sufficient evidence that one cause of this collision was the Railroad's negligence in violating a vegetation control regulation. See *Lukowski v. CSX Transportation, Inc.*, 332 F.Supp.2d 1065, 1068 (N.D. Ohio 2004). Accordingly, under the traditional "physical impact" test – adopted by *Gottshall* as part one of the two-alternative zone-of-danger test – Lukowski and Blauvelt should have been allowed to recover for all the emotional injuries caused by the Railroad's negligence. As *Gottshall* explained:

> "**[T]he zone of danger test** limits recovery for emotional injury to those plaintiffs who sustain a **physical impact** as a result of a defendant's negligent conduct, **or** who are **placed in immediate risk of physical harm** by that conduct."

Gottshall, 512 U.S. at 547-48 (emphasis added).

In other words, the zone-of-danger test subsumes and includes – as part one of a two-alternative standard – the traditional "physical impact" test. And as formulated by the Supreme Court in *Gottshall*:

> "**Under the physical impact test**, a plaintiff seeking damages for emotional injury stemming from a negligent act must have contemporaneously sustained a **physical impact (no matter how slight)** or injury due to the defendant's conduct."

Gottshall, 512 U.S. at 547 (emphasis added).

The Supreme Court, therefore, adopted the traditional "physical impact" test as part one of a two-alternative test, **without modifying, limiting or restricting the traditional doctrine**.

The Sixth Circuit, however, mistakenly interpreted *Gottshall* as having supposedly modified the zone-of-danger test – including the traditional "physical impact" test – so that neither alternative applies unless the emotional injury suffered by a railroad employee was "caused by **fear of physical injury to himself**[.]" *Lukowski*, 416 F.3d at 483-84, quoting *Gottshall*, 512 U.S. at 556 (emphasis added).

What the Sixth Circuit relied on in reaching this remarkable conclusion is the portion of *Gottshall* which – after having restated the traditional "physical impact" and zone-of-danger tests – explained why the pure **zone-of-danger portion** of the zone-of-danger test "is consistent with the FELA's central focus on physical perils." *Gottshall*, 512 U.S. at 555. As *Gottshall* reasoned:

> "[W]hile the statute may have been primarily focused on physical injury, it refers simply to 'injury,' which may encompass both physical and emotional injury. We believe that allowing recovery for negligently inflicted emotional injury as provided for under the zone of danger test best harmonizes these considerations. Under this test, **a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not**. Railroad employees thus will be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting the statute of alleviating the physical dangers of railroading."

Gottshall, 512 U.S. at 556 (emphasis added).

The context of the phrase taken by the Sixth Circuit as limiting the physical-impact test (i.e., "emotional injury caused by **fear of physical injury to himself**") was the Supreme Court's explanation concerning why the pure zone-of-danger portion of the zone-of-danger test "harmonizes" the F.E.L.A.'s "central focus on physical perils," *Gottshall*, 512 U.S. at 555, with the statute's use of the word "injury,"

which "may encompass both physical and emotional injury." *Gottshall*, 512 U.S. at 556. Providing an example of how the second-part of the two-alternative zone-of-danger test (the pure zone-of-danger alternative) would operate, *Gottshall* explained:

> "Under this test, a worker **within the zone of danger** of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, **whereas a worker outside the zone will not**."

Gottshall, 512 U.S. at 556 (emphasis added).

This portion of *Gottshall* was clearly aimed at the second-alternative of the two-part zone-of-danger test (the pure zone-of-danger alternative), and has no application to the first alternative – the traditional "physical impact" test. Consequently, in referring to a worker being able to "recover for emotional injury caused by fear of physical injury to himself," *Gottshall* was referring to the pure zone-of-danger portion of the zone-of-danger test, with its focus on "a worker within the zone of danger," and "a worker outside the zone." *Gottshall*, 512 U.S. at 556.

At most, the portion of *Gottshall* quoted by the Sixth Circuit (as supposedly limiting recovery for "emotional injury caused by fear of physical injury to himself") referred to the second portion of the *Gottshall* test, concerning "a worker within the zone of danger." *Gottshall*, 512 U.S. at 556. The portion of *Gottshall* quoted by the Sixth Circuit did not refer to – and therefore did not modify or limit – the traditional "physical impact" portion of the *Gottshall* test.

In addition to taking a portion of *Gottshall* out of context, the Sixth Circuit ignored the fact that *Gottshall* adopted the most "progressive" rule that was available at common law in 1908 when the F.E.L.A. was enacted. *Gottshall*, 512 U.S. at 555. This progressive rule was the two-alternative zone-of-danger doctrine that incorporated, as part one, the traditional "physical impact" test. As *Gottshall* explained:

> "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a **physical impact** as a result of a defendant's negligent conduct, **or** who are **placed in immediate risk of physical harm** by that conduct."

Gottshall, 512 U.S. at 547-48. And as formulated by the Supreme Court in *Gottshall*:

> "Under the physical impact test, a plaintiff seeking damages for emotional injury stemming from a negligent act must have contemporaneously sustained a **physical impact (no matter how slight)** or injury due to the defendant's conduct."

Gottshall, 512 U.S. at 547 (emphasis added).

Applying the first alternative of the *Gottshall* test, Lukowski and Blauvelt can recover for emotional injury caused – "in whole or in part," *45 U.S.C. § 51* — by the Railroad's negligence, because they sustained "physical impact (no matter how slight)." *Gottshall*, 512 U.S. at 547.

Significantly, the traditional "physical impact" test did not limit recovery to emotional injury "caused by fear of physical injury to himself." Moreover, at the time the F.E.L.A. was enacted in 1908, "the weight of American authority favored

the physical impact test," *Gottshall*, 512 U.S. at 554-55 (internal quotation marks omitted), though "the zone-of-danger test had been adopted by a significant number of jurisdictions." *Gottshall*, 512 U.S. at 555.

Because the zone-of-danger test was "recognized as being a progressive rule of liability that was less restrictive than the physical impact test," *Gottshall* decided "it is reasonable to conclude that Congress intended the scope of the duty to avoid inflicting emotional distress under F.E.L.A. to be coextensive with that established under the zone of danger test." *Gottshall*, 512 U.S. at 555.

This means that *Gottshall* adopted the version of the zone-of-danger test that existed in 1908 – including the traditional physical-impact test – under which an F.E.L.A. plaintiff can recover for emotional injury from a negligent act if he or she "contemporaneously sustained **a physical impact (no matter how slight)** or injury due to the defendant's conduct." *Gottshall*, 512 U.S. at 547.

Gottshall did not rewrite the traditional physical-impact test to include the Sixth Circuit's remarkable new requirement that a plaintiff who sustains a physical impact can only recover for "fear of physical injury to himself." *Lukowski*, 416 F.3d at 483-84, quoting *Gottshall*, 512 U.S. at 556.

The Supreme Court should grant *certiorari* in this case for the following reasons:

1) The Sixth Circuit clearly and unquestionably misinterpreted *Gottshall* as supposedly having modified the traditional "physical impact" test;

2) Further development of this issue in the lower courts would not provide any substantial assistance to the Supreme Court in recognizing and correcting the Sixth Circuit's manifest misinterpretation of *Gottshall*;

3) The Sixth Ciruit's misreading of *Gottshall* threatens injustice in a substantial number of F.E.L.A. cases; and

4) Correcting the Sixth Circuit's manifest misinterpretation of *Gottshall* would not require a substantial amount of the Supreme Court's limited resources. A short *per curiam* opinion would do the job.

Respectfully Submitted,

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